

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 29.10.2018*

+ **CM (M) No.1312/2018**

DIRECTOR (MEDICAL) DELHI & ORS. Petitioners

Through: Mr. Yakesh Anand, Mr. Nimit
Mathur, Mr. Prateek Kumar,
Advocates with Mr. N.K. Arora, Addl.
Director & Mr. Dhruv Prasad, Asstt.

versus

M/S. FORSAN HEALTHCARE PVT. LTD. Respondents

Through: None.

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J. (ORAL)

C.M. No.45111/2018 (for exemption)

Allowed, subject to all just exceptions.

The application is disposed of.

CM (M) No.1312/2018 & C.M. No.45110/2018 (for stay)

1. This petition filed under Article 227 of the Constitution of India impugns the order dated 04.07.2018 of the learned Additional District Judge-01, Patiala House Courts, New Delhi in MCA No.15/2017 dismissing the petitioners' appeal against the order dated 07.06.2017 passed by the learned Additional Sr. Civil Judge (ASCJ), New Delhi whereby their application to review the order dated 06.04.2017 was dismissed. By order dated

6.4.2017, the learned ASCJ has dismissed petitioners' application under Section 5 r/w Section 8 of the Arbitration & Conciliation Act, 1996.

2. The respondent/plaintiff, who is the unsuccessful bidder in the tender process floated by the petitioners has filed a civil suit for permanent and mandatory injunction and made prayer for grant of the following reliefs : - *“(i) Pass a decree thereby declaring that tender no. 111-V/17/11/Dental/2016/Med-1 floated by defendants is null and void; (ii) Declare that the defendants had failed to follow the tender process and therefore the tender no. 111-V/17/11/Dental/2016/Med-1 is void abinitio; (iii) pass a decree of permanent injunction thereby restraining the defendants their agents, officers, employees, departments, association, affiliates from action upon the tender being tender bearing no. 111-V/17/11/Dental/2016/Med-1 in any manner whatsoever; (iv) pass a decree of Mandatory injunction thereby directing the defendants their agents, officers, employees, departments, association, affiliates to undo all the actions taken including the awarding of the tender being tender bearing no. 111-V/17/11/Dental/2016/Med-1 and further steps taken thereon; (v) grant such other relief as this Hon’ble Court may deem fit in favour of the plaintiff and against the defendants.”*
3. The petitioners *inter alia* took a preliminary objection No.5 in their written statement that in view of the clause 8.6 of the tender document which provides *“In the event of any dispute or*

difference arising out or touching to this agreement/contract and/or in relation to the implementation hereof, the same shall be resolved initially by mutual discussion and conciliation. But in the event of failure thereof, the same shall be referred to sole arbitration of the Director General of the Employee State Insurance Corporation (ESIC) or his nominee. The decision of the Sole Arbitrator shall be final and binding upon the parties. The place of the arbitration will be at Delhi. The Arbitrator shall conduct the arbitration proceedings in English in accordance with the provisions of "The Arbitration and Conciliation Act, 1996". Both the parties know that sole Arbitrator might have dealt with the contract agreement in question and is an employee or officer of Employee State Insurance Corporation (ESIC) but the same shall also not disqualify him in any manner from acting as a sole Arbitrator. In this clause the expression of Director General "Employee State insurance Corporation" shall also include any person who is for the time being the administrative head of Employee State Insurance Corporation."

4. The learned Civil Judge observed that "Admittedly, the tender in question was not awarded to the respondent/plaintiff and therefore, no contract was concluded as far as (sic) the parties are concerned. At most, there was invitation to offer and offer only in relation to the present plaintiff. And had the tender in

question was awarded to the plaintiff thereafter, then only such clause might have applied.”

5. The learned Civil Judge has also relied upon the judgment of the learned Single Judge of this court in *Tulip I.T. Services Limited vs. Punjab National Bank*; 2004 (75) DRJ 624 wherein it was held that ‘*Consequently, the position of law appears to be clear and since the response to the tender by the petitioner was not accepted, it had not transformed into a contract and no arbitration agreement could be said sought to exist between the parties permitting the petitioner a resort to arbitration as per the terms of the tender.*’ Accordingly, the learned Civil Judge dismissed the objection so taken by the petitioner.
6. The review petition was also dismissed by the learned Civil Judge vide an order dated 7.6.2017. Learned ADJ-01 has also dismissed the appeal filed by the petitioner by observing that “*Now clause 8.6 would have come into play had the plaintiff being the successful bidder inasmuch there would have been an acceptance of his bid – the tender documents would have become an integral part of the contract thus, in my opinion the contention of the respondent/plaintiff (sic) is per se misconceived. The respondent/plaintiff cannot be in a manner compelled to resort to arbitration in absence of consensus on the said aspect.*”
7. Therefore, when the bids of the respondent/plaintiff were never accepted, there was no concluded contract between the parties.

As such no question arises for the petitioners to invoke the arbitration clause, which does not exist for want of contract.

8. I do not find any merit in the petition. The petition along with the pending application is dismissed. No order as to costs.

(VINOD GOEL)
JUDGE

OCTOBER 29, 2018
‘AA’

